No. 15-109

# In the Supreme Court of the United States

JERMAINE SIMMONS, ET AL., PETITIONERS

*v.*

WALTER J. HIMMELREICH

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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## REPLY BRIEF FOR THE PETITIONERS

When Congress enacted the Federal Tort Claims Act (FTCA), it struck a balance, accepting liability for certain tort claims while protecting the government from burdensome and duplicative litigation. Applying the FTCA judgment bar to judgments of dismissal under the exceptions to liability set forth in 28 U.S.C. 2680 maintains that balance and comports with the plain meaning of the statutory term "judgment." 28 U.S.C. 2676. Respondent's contrary arguments lack merit.

### A. Section 2680's Introductory Clause Does Not Exempt The Identified Claims From Every Other FTCA Provision

Respondent's principal argument (Br. 12-30) is that Section 2680's introductory clause precludes application of the judgment bar to this case. That clause states that "[t]he provisions of this chapter [*i.e.*, Chapter 171 of Title 28 of the United States Code] and

section 1346(b) of this title shall not apply to" the categories of claims identified in Section 2680(a)-(n). 28 U.S.C. 2680. If read literally, that language would mean that no FTCA provision applies to any claim falling within the exceptions set forth in Section 2680. The parties agree that the literal reading conflicts with this Court's decision in *United States* v. *Smith*, 499 U.S. 160 (1991), which held that Section 2679(b) does apply to Section 2680 claims. *Id.* at 161-162, 165-167; Resp. Br. 18-21; Pet. Br. 50-51. Neither party urges the Court to adopt that literal reading here.

As we showed in our opening brief, the proper reading of Section 2680—and the only reading consistent with *Smith*—is that the introductory clause exempts the categories of tort claims set forth in Section 2680 from the FTCA's waiver of sovereign immunity and imposes substantive restrictions on the tort liability of the United States. See Pet. Br. 3-5, 33-35, 52-53. But Section 2680 does not exempt those claims from other FTCA provisions such as the judgment bar. Applying the bar to Section 2680 claims is consistent with how courts have treated Section 2679(a) and (b), the FTCA's other limits on remedies that plaintiffs can pursue outside the FTCA. See *Smith*, 499 U.S. at 161-162, 165-167. It also tracks the judgment bar's core purpose of alleviating the strain that multiple lawsuits on the same facts would pose to government resources and employee morale. See Pet. Br. 23-28.[1] And it is consistent with the decisions of

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[1] Although respondent concedes that the judgment bar's "core concern" is to avoid "duplicative litigation," he asserts that this concern is not implicated unless "duplicative *remedies* exist." Br. 15 (emphasis added). But litigation over Section 2680 can entail months—and even years—of burdensome discovery, trial, and

the Ninth Circuit and the Seventh Circuit, each of which has applied the judgment bar in these circumstances. See Pet. 22-24.[2]

Respondent proposes a different approach. He argues (Br. 18-21) that Section 2680's introductory clause exempts Section 2680 claims from any provision that appeared in the original FTCA, but *not* from any subsequent amendments to the FTCA. He asserts (*ibid.*) that this construction is compelled by Section 421 of the original FTCA—the predecessor to Section 2680—which excluded the enumerated claims from the "provisions of this *title*," *i.e.*, from Title IV of the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 845 (emphasis added). No court has adopted this interpretation of Section 2680, and this Court should not be the first.

1. Congress did not intend Section 2680's introductory cross-reference to encompass only those provisions contained in the original FTCA. See Resp. Br. 18-21. It is true that Section 421's introductory clause originally stated that "[t]he provisions of this *title*"—*i.e.*, Title IV of the Legislative Reorganization Act—would not apply to the identified claims. 60 Stat. 845 (emphasis added). But that formulation does not mean that if Congress later added new provisions to

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appeal. See Pet. Br. 23-28. As a practical matter, allowing an unsuccessful FTCA plaintiff to turn around and sue the individual employee would require the government to defend against essentially the same suit a second time. Respondent's interpretation would undermine the judgment bar's primary purpose.

[2] Our interpretation would also permit the United States to invoke judicial and legislative immunity in any FTCA case alleging torts committed by judges or legislators, as Congress plainly intended in 28 U.S.C. 2674. But see Resp. Br. 12 (denying that Section 2674 applies to Section 2680 cases).

Title IV, Section 421's cross-reference would not likewise encompass those provisions as well. To the contrary, when Congress includes a cross-reference in a statute, it understands that amendments to the referenced provision will affect the operation of the referencing provision.[3]

Other FTCA provisions confirm that Congress did not understand Section 421's reference to "this title" to exclude any subsequent amendments to the FTCA. See § 402, 60 Stat. 842-843 (stating that definitions apply to terms "[a]s used in this title"); § 403(a) and (b), 60 Stat. 843 (addressing agency authority to settle claims "[s]ubject to the limitations of this title"); § 410(a), 60 Stat. 843-844 (stating that jurisdiction over FTCA claims and liability of United States are "[s]ubject to the provisions of this title"); § 420, 60 Stat. 845 (establishing statute of limitations for claims "under this title"). Congress would have understood those cross-references to encompass subsequent amendments to the FTCA. The same is true with respect to Section 2680's cross-reference.

In any event, Congress changed the original cross-reference in 1948, when it recodified the original FTCA and promulgated Section 2680 as positive law. See Act of June 25, 1948 (1948 Act), ch. 646, Tit. VI, Ch. 171, § 2680, 62 Stat. 984. In doing so, Congress

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[3] Imagine a criminal statute in which Section A identifies three prohibited acts, and Section B declares that "Any conviction for violating Section A shall be punished by 30 days of imprisonment." If Congress later adds a fourth prohibited act to Section A, there is no doubt that Section B's 30-day penalty would apply to convictions for violating the new prohibition. Cf. 18 U.S.C. 1961, 1962, 1963 (using cross-references to define, prohibit, and punish "racketeering" under the Racketeer Influenced and Corrupt Organizations Act).

replaced Section 421's cross-reference to "[t]he provisions of this title [*i.e.*, Title IV]" with a cross-reference to "[t]he provisions of this chapter and section 1346(b)." *Ibid.*; see 28 U.S.C. 2680. The parties agree that the recodification made no substantive change. See Resp. Br. 20-21. But if that is so, then the deletion of any express reference to Title IV confirms that Congress did not understand even the *original* cross-reference to encompass only those provisions appearing in the original Title IV (but not any subsequent amendments).[4]

Respondent's interpretation of Section 2680's cross-reference is quite difficult to implement in practice. To determine whether a particular FTCA provision applies to a Section 2680 claim, courts and individuals must disregard the United States Code, determine whether the provision appeared in Title IV, and then decide whether or how it might apply to the case at hand. See Resp. Br. 19-21.

Respondent's own brief illustrates the potential for confusion. For example, respondent declares (Br. 12) that, under his theory, 28 U.S.C. 2675's administrative-exhaustion requirement "does 'not apply'" to Section 2680 claims. But the exhaustion requirement was not part of Title IV: Congress added it to the FTCA in 1966. See Act of July 18, 1966, Pub.

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[4] Respondent insists that the original and recodified versions of the cross-references are incompatible, and that courts should ignore the recodified version and instead apply the original. Br. 19-21 (arguing that the Statutes at Large trump the United States Code when the provisions are "inconsisten[t]") (citation omitted). The better approach is to read the original and recodified versions in harmony with one another—and to recognize that neither limits the cross-reference only to provisions that appeared in the original FTCA.

L. No. 89-506, §§ 2(a), 7, 80 Stat. 306-307. Under respondent's own theory, then, the introductory clause to Section 2680 does not exempt the later-enacted Section 2675, and thus that requirement *does* apply to Section 2680 claims. Respondent's (entirely understandable) error illustrates that his theory is impractical.

2. Respondent is also wrong to assume that the original version of Section 2680's introductory clause exempted the identified claims from *all* other FTCA provisions. As our opening brief explained (Br. 51-53), Congress intended Section 2680 claims to be subject to a variety of other original FTCA provisions, including those that (1) applied the Federal Rules of Civil Procedure to FTCA cases; (2) authorized appellate review of district court judgments; (3) defined key statutory terms; and (4) made the FTCA the exclusive remedy for claims that might otherwise have been brought directly against federal agencies. See Legislative Reorganization Act, §§ 402, 411, 412, 423, 60 Stat. 842-846.

a. Respondent does not deny that the claims identified in Section 421 (now Section 2680) were subjected to the Federal Rules of Civil Procedure by Section 411 of the original FTCA. See Resp. Br. 28-29. That refutes his assertion that Section 421's introductory language must be read literally to exempt the identified claims from all other original FTCA provisions.

b. Respondent concedes (Br. 29) that under his theory, Section 412 of the original FTCA—which authorized appellate review of final FTCA judgments—would not apply to the claims identified in Section 421. But Congress plainly intended to allow appeals of Section 421 judgments, and this Court

adjudicated an appeal of such a judgment that was initiated pursuant to Section 412. See *United States* v. *Spelar*, 338 U.S. 217 (1949).

Respondent seems to assume (Br. 29), that Section 412's function was merely to authorize FTCA appeals to the Court of Claims. In fact, that provision *also* provided the legal basis for review in the courts of appeals. See Legislative Reorganization Act § 412(a)(1) and (b), 60 Stat. 844, 845. In any event, Congress plainly understood Section 412 to make Section 421 claims appealable to the Court of Claims in appropriate circumstances. In the 1948 recodification, Congress stated that the Court of Claims' appellate jurisdiction extended to "final judgments in the district courts in civil actions *based on tort claims brought under section 1346(b)*." 1948 Act § 1504, 62 Stat. 942 (emphasis added). The italicized phrase unambiguously encompasses Section 421 appeals.

c. Congress also understood that the original FTCA's definitional provision—Section 402—would apply to Section 421 cases. Two of the defined terms ("Federal agency" and "Employee of the Government") appear in Section 421(a) and (e). This Court relied on Section 402(b)'s definition of the latter term when interpreting Section 2680(a)'s discretionary-function exception in *Dalehite* v. *United States*, 346 U.S. 15, 33 n.28 (1953).

Respondent denies (Br. 28) that applying the definitions to Section 2680 is inconsistent with his theory. He asserts that whereas Section 2680 "directs that the [FTCA's] provisions 'shall not apply' to certain 'claim[s],'" the definitions "are definitions of *statutory terms*," and accordingly "do not apply or attach to 'claims' at all, so there is nothing for [Section] 2680 to

render inapplicable." *Ibid.* It is not clear precisely what respondent means by this statement, because virtually any case in which the definitional provision is used to interpret Section 2680 *will* involve a Section 2680 "claim." See, *e.g.*, *Dalehite*, 346 U.S. at 33 n.28. Respondent's concession that Section 402 governs the proper interpretation of Section 2680 is incompatible with his argument that none of the FTCA's original provisions apply to Section 2680 claims.

d. Our opening brief cited testimony by Assistant Attorney General Francis Shea establishing that Congress understood Section 423 of the original FTCA—the precursor to 28 U.S.C. 2679(a)—to apply to claims falling under "the exceptions of the act [including the Section 2680 exceptions]." Pet. Br. 52 (quoting *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 29 (1942) (*1942 Hearings*)). Section 2679(a) makes the FTCA the exclusive remedy for tort claims against the government, even against agencies that may otherwise "sue and be sued" in their own name. *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994) (citation omitted). Respondent does not deny that Shea's statement is inconsistent with respondent's theory that Section 2679(a)—like all other provisions of the original FTCA—does not apply to Section 2680 claims.[5]

Respondent nonetheless argues (Br. 24) that "agencies with sue-and-be-sued clauses *can indeed* be sued on the claims listed in [Section] 2680," and he

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[5] Although the Court declined to rely on other aspects of Shea's remarks in *Meyer*, 510 U.S. at 478-479, it did not question Shea's statement indicating that Section 2679(a) would apply to Section 2680 claims. See Pet. Br. 52.

categorically asserts that "[Section] 2679(a) "does *not* apply—and was *always understood* not to apply—to claims exempted by [Section] 2680." That is simply incorrect. For decades, the courts of appeals have regularly applied Section 2679(a) to bar plaintiffs from directly suing agencies with respect to tort claims encompassed by Section 2680. See, *e.g.*, *Audio Odyssey, Ltd.* v. *United States*, 255 F.3d 512, 522 (8th Cir. 2001); *Davric Me. Corp.* v. *United States Postal Serv.*, 238 F.3d 58, 61-64 (1st Cir. 2001); *Franklin Sav. Corp.* v. *United States*, 180 F.3d 1124, 1142-1143 (10th Cir.), cert. denied, 528 U.S. 964 (1999); *FDIC* v. *Citizens Bank & Trust Co.*, 592 F.2d 364, 371 (7th Cir.), cert. denied, 444 U.S. 829 (1979); *Expeditions Unlimited Aquatic Enters., Inc.* v. *Smithsonian Inst.*, 566 F.2d 289, 295-299 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978); *Safeway Portland E.F.C.U.* v. *FDIC*, 506 F.2d 1213, 1215-1216 (9th Cir. 1974); *Edelman* v. *FHA*, 382 F.2d 594, 596 (2d Cir. 1967); see also Comment, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 549-551 & n.111 (1947). Respondent ignores these decisions, which directly contradict his interpretation of Section 2680's introductory language.

Respondent is correct (Br. 24-26) that, notwithstanding Section 2679(a)'s sue-and-be-sued provision, courts have allowed tort plaintiffs to sue the Tennessee Valley Authority, the Panama Canal Company, and certain federal banks on claims exempted from the FTCA by Section 2680(*l*), (m), and (n). But none of respondent's eight cited decisions discusses Section 2680's introductory clause exempting the identified claims from "the provisions of this chapter" or identi-

fies that clause as the basis of its holding. They accordingly do not support respondent's theory.[6]

In short, this Court in *Smith* correctly recognized that Section 2679(b) *does* apply to Section 2680 claims, 499 U.S. at 161-162, 165-167, thereby refuting any argument that the introductory clause exempts the enumerated claims from all of the FTCA's other provisions. Respondent's interpretation of Section 2680's introductory clause simply cannot be squared with *Smith*.[7]

**B. Respondent's FTCA Action Was "An Action Under Section 1346(b)"**

Respondent also argues (Br. 31-37) that the dismissal of his FTCA suit does not trigger the judgment bar because the suit was not "an action under section 1346(b)" 28 U.S.C. 2676. In his view, the phrase "an action under section 1346(b)" refers only to actions that "actually *fall[] within [Section 1346(b)'s] jurisdictional scope*." Br. 33 (citation omitted). Respondent is mistaken.

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[6] Respondent's decisions reflect legislative history indicating that Congress's specific purpose was to permit suits directly against the covered entities. See, *e.g.*, H.R. Rep. No. 830, 81st Cong., 1st Sess. 4-5 (1949); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945); see also *Sterrett* v. *Milk River Prod. Credit Ass'n*, 647 F. Supp. 299, 301-302 n.6 (D. Mont. 1986). Section 2680(*l*), (m), and (n) are different from the other categories of claims set forth in Section 2680(a)-(k), as to which Congress *did* seek to immunize federal agencies.

[7] Respondent is wrong to suggest (Br. 21-22) that *Smith* turned on this Court's resolution of a perceived conflict between Section 2680's introductory clause and Section 2679(d)(4)'s language recognizing that Section 2679(b) would apply to Section 2680 claims. He offers no evidence that either Congress or this Court saw any inconsistency between those provisions.

1. Respondent's argument is foreclosed by *Meyer*. That case held (1) that Section 2679(a)'s reference to "claim * * * cognizable under section 1346(b)" encompasses all tort claims that are "actionable under" that provision, and (2) that to be "actionable," the claim need only allege the six jurisdictional elements set forth in Section 1346(b). 510 U.S. at 477; see Pet. Br. 45-48. An FTCA suit can therefore be actionable under Section 1346(b)—and thus an "action under section 1346(b)" for purposes of the judgment bar—even if it is ultimately dismissed under Section 2680. Pet. Br. 46-47.

Respondent seeks to distinguish *Meyer* on the ground that Section 2679(a) refers to actions "*cognizable* under section 1346(b)" instead of simply actions "under section 1346(b)," as in the judgment bar, 28 U.S.C. 2676. Br. 35-37 (emphasis added). But the word "cognizable" if anything makes Section 2679(a)'s phrase *narrower* than the judgment bar. In any event, *Meyer* equated the phrase "cognizable under section 1346(b)" with "actionable under § 1346(b)," 510 U.S. at 477, and there is no basis for concluding that an "action under section 1346(b)" means something other than a claim that is "actionable under § 1346(b)."

Respondent points out (Br. 36) that *Meyer* did not expressly state that a claim that is exempted by Section 2680 is still "cognizable" under Section 1346(b). But that is the necessary consequence of *Meyer's* statements that (1) a claim is "cognizable under section 1346(b)" so long as it alleges the six elements set forth in that provision, and (2) "[t]he question is not whether a claim is cognizable under the FTCA generally * * * but rather whether it is 'cognizable *under section 1346(b)*'" in particular. 510 U.S. at 477 & n.5.

That language recognizes the possibility that an FTCA claim might *not* be cognizable under other FTCA provisions—such as Section 2680—even though it *is* cognizable under Section 1346(b).[8]

2. Respondent's construction of "action under section 1346(b)" is also inconsistent with Congress's use of virtually identical language elsewhere in the FTCA. Most significantly, Section 2679(d) sets forth the procedures under which the United States must be substituted as the defendant in a tort action filed against a federal employee for conduct within the scope of his employment. 28 U.S.C. 2679(d). In three separate provisions, Section 2679(d) indicates that when such substitution is proper, the case "shall be deemed" to be "an *action* against the United States *under the provisions of this title* [*i.e.*, under Title 28 of the United States Code]." 28 U.S.C. 2679(d)(1)-(3) (emphasis added) Section 2679(d)(4) then states that any such case "shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and *shall be subject to the limitations and exceptions* applicable to those actions." 28 U.S.C. 2697(d)(4) (emphasis added).

Section 2679(d) thus makes clear Congress's understanding that an action "under" the FTCA is one that *invokes* the FTCA, regardless of whether or not

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[8] Respondent also asserts (Br. 36) that his FTCA suit was not "cognizable" under Section 1346(b) because Section 2680's introductory clause renders Section 1346(b)'s jurisdictional grant inoperative with respect to Section 2680's exceptions. This Court rejected a similar argument in *Smith*, where it held that Section 2679(b)(1)'s phrase "[t]he remedy * * * provided by sections 1346(b) and 2672" encompasses Section 2680 claims, even though Section 2680 forecloses any means of recovery. 499 U.S. at 166; see Pet. Br. 48-50.

the action is ultimately foreclosed by Section 2680. That is inconsistent with respondent's claim that the judgment bar's phrase "action under section 1346(b)" refers only to actions that *properly* invoke Section 1346(b) and are *not* subject to Section 2680.

Along similar lines, Section 2674 of the FTCA states that, "[w]ith respect to any *claim under this chapter* [*i.e.*, Chapter 171 of Title 28 of the U.S. Code, 28 U.S.C. 2671-2680]," the United States may assert a variety of legal defenses—including "judicial or legislative immunity"—that either it or the alleged tortfeasor could ordinarily assert in litigation. 28 U.S.C. 2674 (emphasis added). That provision only makes sense if a "claim under this chapter" covers any claim in which the plaintiff invokes the FTCA as the basis of his claimed relief, regardless of whether defense ultimately forecloses relief on that claim. Respondent ignores Sections 2679(d) and 2674, both of which fatally undermine his theory.

### C. A Section 2680 Dismissal Is A "Judgment"

Respondent's third main argument (Br. 37-50) is that the judgment bar's unadorned reference to "judgment" excludes judgments dismissing actions under Section 2680. In respondent's view, the term judgment encompasses only the subset of judgments entitled to preclusive effect under *res judicata*. He is wrong about that, but in any event Section 2680 dismissals do have preclusive effect and therefore satisfy his test.

1. Respondent does not seriously dispute that when Congress enacted the FTCA in 1946, a Section 2680 dismissal would have qualified as a "judgment" as that term was used in (1) standard legal dictionaries; (2) the Federal Rules of Civil Procedure; (3) judi-

cial opinions; (4) the Restatement's discussion of *res judicata*; and (5) other provisions of the FTCA. See Resp. Br. 37-40; Pet. Br. 18-22, 29-32. Respondent has not identified a single pre-existing definition of "judgment"—in *any* context—that would exclude a Section 2680 judgment of dismissal.[9] And there is no indication that Congress meant to exclude Section 2680 dismissals from the meaning of "judgment" when it drafted the judgment bar.

2. In any event, a Section 2680 dismissal qualifies as a "judgment" under respondent's own view that the bar covers any judgment with "preclusive effect" in a subsequent action against the United States under common-law *res judicata*. Br. in Opp. 33; see Resp. Br. 40, 42-43, 45, 50; Pet. Br. 33-41.

a. Respondent asserts (Br. 44-47) that a jurisdictional dismissal can *never* have claim-preclusive effect. But that general rule does not apply in the unusual circumstance when a jurisdictional determination also necessarily passes on the substantive merits of the claim. See Pet. Br. 36-40. In cases involving such dual-purpose dismissals, the policies underlying *res judicata*—avoiding duplicative litigation, conserving judicial resources, and encouraging reliance on prior decisions—all support granting the dismissal preclusive effect. *Ibid.* Justice Breyer recognized as much in *Rose* v. *Town of Harwich*, 778 F.2d 77 (1st Cir.

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[9] The lone definition respondent cites (Br. 37-38) from *Black's Law Dictionary* (3d ed. 1933) does not count, because "a federal court always has jurisdiction to determine its own jurisdiction," *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002). And Congress's use of the term "judgment" in other FTCA provisions and the legislative history (see Resp. Br. 39 & n.4) is fully consistent with the ordinary meaning of that term.

1985), cert. denied, 476 U.S. 1159 (1986), which held that a dismissal for lack of jurisdiction under the Massachusetts statute of limitations was nonetheless "on the merits" and capable of triggering claim preclusion. *Id.* at 79-80; Pet. Br. 36-37, 39.

Respondent does not explain why it makes sense to deny claim-preclusive effect to jurisdictional dismissals that also necessarily pass on the substantive merits of a claim. He does challenge (Br. 48 n.7) our reliance on *Rose*, asserting that the First Circuit "held that the statute of limitations applied by the state court in that case was not truly jurisdictional." That is not correct: *Rose* held that even though the state-court decision *was* jurisdictional, it was nonetheless *also* entitled to claim-preclusive effect because it was also "on the merits" and extinguished the plaintiff's "underlying substantive 'right'" to recover. 778 F.2d at 79-81. Crucially, the court explained that the "jurisdictional" exception to *res judicata* applies only to "technical" or "procedural" defects that may be "cured" in a subsequent action. *Id.* at 79; see Pet. Br. 37 & n.15. A Section 2680 dismissal does not trigger that exception.

Our opening brief also cited (Br. 38 & n.18) cases establishing that claim preclusion attaches to jurisdictional dismissals based on state sovereign immunity. Respondent asserts (Br. 49) that state sovereign immunity "may well be an affirmative defense that does not deprive *state* courts of jurisdiction." But the States at issue in the cited cases *do* treat state sovereign immunity as "jurisdictional," even though they

*also* recognize that the dismissals are "on the merits" for *res judicata* purposes.[10]

b. Respondent next argues (Br. 48) that a Section 2680 dismissal does not trigger claim preclusion because "it does not reflect any judgment about the substantive tort claim under state law." But whether a Section 2680 dismissal passes on the substantive merits of a claim under *state law* is irrelevant. The FTCA is a federal statute, and although it generally subjects the United States to liability under applicable principles of state tort law, it also "specfically set[s] forth" the circumstances "where the liability of the United States is *not* co-extensive with that of a private person under state law." *Richards* v. *United States*, 369 U.S. 1, 13-14 (1962) (emphasis added). A Section 2680 dismissal adjudicates the plaintiff's substantive right under federal law—the FTCA—and it would preclude a subsequent FTCA action against the United States for that reason. *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 501-502 (2001) (explaining that claim preclusion attaches to decisions "pass[ing] upon the substantive merits" of the claim).

c. Respondent ignores our independent argument that a Section 2680 dismissal has claim-preclusive effect under *Angel* v. *Bullington*, 330 U.S. 183, 190 (1947). There, the Court granted preclusive effect to the North Carolina Supreme Court's decision that it lacked jurisdiction over a suit for a deficiency judgment arising from the sale of real estate. *Id.* at 187-188. The Court explained that claim preclusion can

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[10] See, *e.g.*, *Tinsley* v. *Washington Metro. Area Transit Auth.*, 55 A.3d 663, 667 (Md. 2012); *Texas Dep't of Transp.* v. *Jones*, 8 S.W.3d 636, 638 (Tex. 1999); *Atlantic Coast Conference* v. *University of Md.*, 751 S.E.2d 612, 617 (N.C. Ct. App. 2013).

apply to such jurisdictional dismissals when they are based "not on the ground that the distribution of judicial power among the various courts of the State requires the suit to be brought in another court in the State," but rather "on the inaccessibility of all the courts of the State to such litigation." *Id.* at 190; see Pet. Br. 35-36. A Section 2680 dismissal satisfies the *Angel* rule because it conclusively establishes that the FTCA claim would necessarily fail in any federal court.

d. The parties agree that a Section 2680 dismissal triggers the *issue*-preclusion branch of res judicata. Resp. Br. 49; Pet. Br. 39-41. That is enough to satisfy the definition of "judgment" set forth in respondent's brief opposing certiorari (at 33), which encompassed any judgment "capable of having some preclusive effect in the first place."

Respondent now asserts (Br. 37, 49-50) that the judgment bar encompasses only judgments with *claim*-preclusive effect. But he fails to explain why that limitation makes sense. Respondent's theory that *res judicata* is relevant to the judgment bar (Br. 42-43) rests on two statements in the legislative history showing that Congress wanted to protect employees by promoting "symmetry" and extending to them the same preclusive benefit of an FTCA judgment that would otherwise accrue only to the United States. In the first statement, Assistant Attorney General Shea explained that under the judgment bar, a "[j]udgment in a tort action constitutes a bar to further action upon the same claim, *not only against the Government* (as would have been true under [*res judicata*]) *but also against the delinquent employee.*" *1942 Hearings* 27 (emphasis added). In the other, the Senate Report on

a draft of the FTCA stated that an FTCA judgment "will bar further action upon the same claim *against the negligent employees as well as against the Government.*" S. Rep. No. 1196, 77th Cong., 2d Sess. 6 (1942) (emphasis added).

At most, those statements suggest that the judgment bar promotes symmetry by granting employees the same protection that an FTCA judgment would give the United States in a subsequent FTCA suit. Under issue preclusion, a Section 2680 dismissal completely insulates the United States from any such subsequent litigation. Symmetry requires insulating the government employee in the same way.

3. Respondent also argues (Br. 51-53) that the judgment bar does not apply to judgments based on defenses personal to the government, such as those set forth in Section 2680. That argument conflicts with his prior view that the bar encompasses any judgment "capable of having some preclusive effect in the first place,"—*i.e.*, in a subsequent suit against the United States—and that its purpose is "to *expand* that [same] preclusive effect to *non-parties*." Br. in Opp. 33; see Resp. Br. 40, 42-43, 45, 50.

Respondent's personal-defense argument reflects a new understanding of "judgment" that does not turn on whether the judgment at issue would bar a subsequent action against the United States. Rather, it turns on whether an analogous judgment in favor of an employee would have barred a subsequent action against his employer based on *respondeat superior* liability; if so, then respondent counts it as a "judgment" for purposes of the judgment bar. See Resp. Br. 51-53. That very different—and far more complicated—test has no basis in the FTCA.

a. The judgment bar does not mention *res judicata*, and its use of the terms "judgment" and "bar" cannot fairly be read to incorporate respondent's new approach. The legislative history is equally unhelpful. That history reveals—at most—a desire to extend to the employee the preclusive benefits of an FTCA judgment that would otherwise accrue only to the United States. See pp. 17-18, *supra*. It does not support respondent's new position that even a judgment that *does* have preclusive effect in a subsequent suit against the United States will sometimes not trigger the judgment bar.[11]

b. Respondent's personal-defense argument also contradicts the underlying purposes of the judgment bar and Section 2680. The judgment bar's core goal is to alleviate the strain that repeat litigation over the same facts poses to government resources and morale. See Pet. Br. 23-28; *Will* v. *Hallock*, 546 U.S. 345, 353-354 (2006). Section 2680's exceptions are likewise "designed to protect certain important government functions and prerogatives from disruption," and they "mark the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Molzof* v. *United States*, 502 U.S. 301, 311 (1992) (citation and

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[11] Respondent discusses (Br. 40-43, 51-52) how various state courts would have applied *res judicata* in circumstances where a tort plaintiff first sues an employee, and only later sues the employer. But he presents no evidence that that Congress was aware of the divergent state practices with respect to that application of *res judicata*, and no evidence that Congress intended the judgment bar to cover only the exact same kinds of judgments that would be entitled to *res judicata* effect in those circumstances.

internal quotation marks omitted); see *1942 Hearings* 33.

Given those purposes, Congress would not have exempted Section 2680 judgments from the judgment bar. Its desire to avoid multiple lawsuits would have been *strongest* with respect to those claims—identified in Section 2680—as to which it refused to permit even an *initial* suit against the United States. Allowing a subsequent suit against the employee would perpetuate the same harms—including distraction to government employees and intrusive inquiries into agency documents and decision-making processes—that Section 2680 was designed to avoid.

### D. Respondent's Policy Arguments Do Not Support Excluding Section 2680 Dismissals From The Judgment Bar

Respondent raises various policy arguments to support his construction of the judgment bar. Even if his concerns carried practical weight—which they do not—they would not support his conclusion that Section 2680 dismissals do not trigger the bar.

1. Respondent notes (Br. 54-55) that a broader construction of the judgment bar could incentivize plaintiffs to bring *Bivens* actions against the employee first, in order to avoid a jurisdictional dismissal under the FTCA. That is not a significant concern. Plaintiffs will almost always prefer to sue the United States under the FTCA, both because of the government's deeper pockets and because of the greater difficulty of establishing a right to relief under *Bivens*.

In rare cases where the plaintiff fears the potential applicability of Section 2680, he is free to bring both *Bivens* and FTCA actions, either jointly or sequentially. The judgment bar comes into play *only* if the

FTCA claim is litigated to a final judgment. If the plaintiff initiates the FTCA claim and then becomes aware that it is subject to one of Section 2680's exceptions, he can invoke various procedural mechanisms—including Federal Rules of Civil Procedure 15 and 41—in order to abandon the FTCA claim and avoid a final judgment. See, *e.g.*, *Manning* v. *United States*, 546 F.3d 430, 435, 438 (7th Cir. 2008) (noting that *Bivens* plaintiff can "voluntarily withdraw a contemporaneous FTCA claim"), cert. denied, 558 U.S. 1011 (2009).[12]

2. Respondent also notes (Br. 54) that enforcing the judgment bar's plain meaning could foreclose subsequent claims against the employee when the FTCA case is dismissed on purely procedural grounds, such as for improper venue. The judgment bar's application in those circumstances is not before the Court, and it is possible that some of the standard, contemporaneous definitions of "judgment" could plausibly be read to exclude such dismissals. See Pet. Br. 19-20; see also 28 U.S.C. 1406.

Scope-of-employment dismissals (Resp. Br. 54) are also not implicated here. As a practical matter, a plaintiff who is uncertain of whether the alleged tortfeasor acted within the scope of his employment can

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[12] Respondent is wrong to imply (Br. 55) that *Bivens* claims should be immune from the bar altogether. Congress expressly exempted *Bivens* claims from the FTCA's exclusive-remedy provision, 28 U.S.C. 2679(b)(2)(A), but it made no such exemption to the judgment bar. And although his amicus makes a similar argument (Professors Sisk & Pfander Br. 20-27) based on the judgment bar's phrase "by reason of the same subject matter," that argument is foreclosed by *Hui* v. *Castaneda*, 559 U.S. 799, 805-806 (2010) (construing identical language in 42 U.S.C. 233(a)). See Pet. Br. 6, 15.

insulate himself from the judgment bar by bringing his action against the employee directly. Doing so would trigger the FTCA's certification and substitution provision, 28 U.S.C. 2679(d), and the suit would either proceed under the FTCA (if the employee were deemed to have been within the scope of employment) or as an ordinary tort suit (if not).[13]

What *is* before the Court is a dismissal under Section 2680, which erects a substantive bar to relief that completely insulates the United States from any further FTCA suit. See Pet. Br. 34-35. As noted, applying the judgment bar to cases against employees arising from the same subject matter tracks the statutory text and effectuates the core purposes of both the bar and of Section 2680 itself.

To the extent respondent's policy concerns warrant any departure from the judgment bar's plain meaning, the Court should adopt the Ninth Circuit's approach from *Pesnell* v. *Arsenault*, 543 F.3d 1038 (2008). As explained in our opening brief (at 41-43), that court applies the bar to FTCA judgments that reflect Congress's decision to "flatly reject[] liability" for the claim at issue, but not to technical or procedural dismissals involving curable defects. *Id.* at 1046 (Clifton, J., concurring); see *id.* at 1042 (opinion for court). The Ninth Circuit's approach—which respondent

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[13] The judgment bar might not apply to scope-of-employment judgments at all, because its reference to "employee" might reasonably be read to exclude a person who has already been adjudicated, in the FTCA case, to have been outside the scope of employment in connection with the alleged tort. 28 U.S.C. 2676. If not, such dismissals would trigger the judgment bar even under respondent's own principal *res judicata* theory, because they would trigger claim preclusion in any subsequent FTCA action against the United States.

ignores—is faithful to the core purposes of the FTCA and far easier to apply than respondent's *res judicata* theories. It also correctly treats Section 2680 dismissals as triggering the judgment bar.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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*Solicitor General*

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